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No. 80-1542

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOHN RIVERS and TOM LAMB (Dan P. Rivers as Executor of the Will of John Rivers, substituted in place and stead of John Rivers, deceased),

Petitioners,

vs.

ROSENTHAL & COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

I. STATEMENT OF THE CASE

Respondent Rosenthal & Company is a limited partnership which is a futures commission merchant registered under the Commodity Exchange Act ("CEA"), 7 U.S.C. § 1, *et. seq.* The Petitioners were speculators in certain commodity options including sugar, rubber, and cocoa, and are former customers of the Respondent. After sustaining market losses, the Petitioners, plaintiffs below, filed a Complaint against Respondent and Carl M. Tipton, who is not a party before this

Court, in the United States District Court for the Southern District of Georgia seeking damages for alleged violation of the antifraud[1] and registration[2] requirements of the regulations promulgated under the CEA. (A-47)[3] The Petitioners also asserted common law fraud and negligence claims which are still pending in the trial court.

The Petitioners' substantive allegations of misrepresentations in connection with commodity option transactions, which are contained in the Complaint and repeated in Petitioners' Statement of the Case, have been denied by the Respondent and are not relevant to resolution of the issues sought to be brought before this Court. Respondent filed a Motion to Dismiss in the District Court on the ground that the CEA does not create a private right of action, at least in those circumstances where the Congress has expressly created a complete and comprehensive trial type administrative reparation procedure whereby persons aggrieved by violations of the Act can seek relief, including monetary damages, subject to a direct review by the United States Courts of Appeals. (A-59)

The District Court denied Respondent's Motion to Dismiss, entered an appropriate certification permitting application for interlocutory appeal, and stayed further proceedings in the trial court pending final action by the Court of Appeals. (A-44)

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[1] 17 C.F.R. §32.9.

[2] 17 C.F.R. §32.3.

[3] Respondent has not filed a separate appendix; references are to the Appendix annexed to the Petition.

On interlocutory appeal the Fifth Circuit reversed, holding that the Commodity Exchange Act does not expressly or by implication create a private right of action apart from the administrative reparation procedures,[4] arbitration,[5] and the *parens patriae* right of action granted to the states.[6]

The Petitioners failed to seek a stay of the lower court's mandate and judgment pursuant to 28 U.S.C. § 2101(f), Fed. R. App. P. 41(b), and Local Rule 17 of the Fifth Circuit. Therefore, the Fifth Circuit has duly issued its judgment and mandate (A-43), as has the District Court, and the Petitioners are now pursuing their common law claims in the District Court.

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[4] 7 U.S.C. §18.

[5] 7 U.S.C. §7a(11).

[6] 7 U.S.C. §13a-2.

II. SUMMARY OF THE REASONS FOR DENYING THE WRIT

There is no substantial federal question for review in light of the Fifth Circuit's meticulous and correct application of the well-articulated standards of this Court concerning implied rights of action.

Since 1974 this Court has decided a consistent line of cases strictly limiting the circumstances under which federal courts may infer the existence of implied private rights of action.[7] These cases hold that a private right of action may be implied only where there is clear evidence of an affirmative congressional intent to create a private right of action. *E.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, at 568 (1979). As the Fifth Circuit concluded in this case, the legislative history and language of the CEA provide no such clear evidence. Moreover, the CEA creates express, carefully described remedies which should preclude the judiciary from inferring that Congress absentmindedly forgot to include an intended private right of action in the district courts.

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[7] *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); *Cort v. Ash*, 422 U.S. 66 (1975); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980).

The case has been correctly decided below, and review on certiorari would amount to a pointless and unwarranted procedural formality.[8]

III. REASONS FOR DENYING THE WRIT

There is no substantial federal question for resolution by this Court in light of the line of its decisions since 1974 prohibiting the federal judiciary from inferring a private right of action in the absence of clear evidence that the Congress intended to create such a right of action.[9]

In holding that there is no implied private right of action under § 17(a) of the Securities Exchange Act of 1934, this Court recently stated:

> "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." [citation omitted] Instead, our task is limited solely to determining whether Congress intended to create a private right of action. . . . *Touche Ross & Co. v. Redington*, 442 U.S. 560, at 568 (1979).

Despite a thorough and sifting analysis of the legislative history of the CEA, the Fifth Circuit in this

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[8] This Court has already granted certiorari to review *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980), Nos. 80-757, 80-895, and 80-936 in the Supreme Court, where the Second Circuit inferred the existence of a private right of action under various sections of the CEA.

[9] See n. 7, *supra*.

case was unable to find such an intent. To the contrary, during 1973 the Congress specifically considered but failed to adopt three proposed amendments to the CEA which would have expressly created a private right of action. H.R. 11195, 93d Cong., 1st Sess. § 17(3) (1973); S. 2837, 93d Cong., 1st Sess. § 505 (1973); S. 2578, 93d Cong., 1st Sess. § 203(3) (1973). Such a deliberate failure to adopt a proposal creating an express right of action was relied on by this Court as a factor in concluding that private rights of action could not be inferred under the Rail Passenger Service Act of 1970 in *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, at 460-461 (1974).

Rather than adopting any one of the three Bills which would have created an express private action, Congress chose instead to establish an administrative reparation remedy. 7 U.S.C. § 18 authorizes persons aggrieved by violations of the Act to bring a trial type reparation proceeding before the Commodity Futures Trading Commission ("CFTC") to recover money damages and other relief. Evidence that Congress intended this administrative remedy to be the exclusive remedy for a private litigant is demonstrated by the fact that a party dissatisfied with the result of a reparation proceeding may not simply initiate a *de novo* private action in the district court, but rather is limited to a direct review by the United States Court of Appeals for the circuit where the administrative hearing was held. 7 U.S.C. § 18(g). One of the primary reasons for establishing the reparation procedure was to insure uniform interpretations and decisions at the initial adjudication by persons with experience and

expertise in commodity transactions.

In contrast to the express general grant of authority to the district courts to entertain suits arising under the Securities Exchange Act of 1934, the CEA contains only the following two limited grants of authority to the district courts. 7 U.S.C. § 13a-1 authorizes the CFTC, or the Attorney General upon request of the CFTC, to initiate actions in the district courts to enjoin or restrain violations of the Act. Similarly, 7 U.S.C. § 13a-2 authorizes attorney generals of the various states, and certain other state officers, to initiate actions in the federal district courts to enjoin violations of the Act or to obtain damages on behalf of residents of the state. Even this grant of authority is limited because the state may not bring such an action against certain entities including contract markets, clearing houses, and floor brokers. Moreover, the state attorney general initiating this express right of action is required to serve a copy of the complaint upon the CFTC so as to protect the CFTC's right to intervene in the suit in order to maintain a uniform construction of the Act consistent with orderly regulation of national commodity markets.

In sum, the Congress has specifically provided a very detailed, comprehensive, and delicately balanced set of remedies for violations of the CEA. Certain of the remedies are carefully circumscribed or limited, apparently with a view toward preserving stable and orderly national commodity markets. Under such circumstances, "it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.'" *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, at 20, quoting *Cannon v. Univer-*

sity of Chicago, 441 U.S. 677, at 742 (Powell, J., dissenting). "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Transamerica, supra*, at 444 U.S. 20, quoting *Botany Mills v. United States*, 278 U.S. 282, at 289 (1929).

In *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), this Court summarily refused to infer a private right of action under the Federal Records Act, an act which provides far less extensive and comprehensive remedies than those explicitly provided under the CEA, based on the following reasoning:

> This Court has spent too many pages identifying the factors relevant to uncovering congressional intent to imply a private cause of action to belabor the topic here. Our most recent pronouncement on the subject, *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), readily disposes of the question. First, the language of the Records Act merely "proscribes certain conduct" and does not "create or alter any civil liabilities." *Id.*, at 19. The Records Act also expressly provides administrative remedies for violations of the duties it imposes, implicating our conclusion in *Transamerica Mortgage* that it is "an elemental canon of statutory construction where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Kissinger v. Reporters Committee, supra*, at 445 U.S. 148-149.

Petitioners' primary argument that a private right

of action may be implied under the CEA is to the effect that *Cannon v. University of Chicago*, 441 U.S. 677 (1979), somehow undermines the consistent string of cases and analysis used by this Court since 1974 for determining whether or not a private right of action is implied. However, the *Cannon* majority opinion stated clearly that since 1974 this Court has utilized an approach of "strict construction of the remedial aspect of the statute" and that a private right of action should be implied only "under certain limited circumstances." 441 U.S. at 698 and 717.

Moreover, the *Cannon* case involved alleged discrimination on which this Court has historically placed special importance.

Indeed, Mr. Justice Stevens, writing for the majority in *Cannon*, distinguished *Cannon* from this case with the following language:

> When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights. . . . Title IX presents the atypical situation in which *all* of the circumstances that the Court has previously identified as supportive of an implied remedy are present. *Id.*, at 441 U.S. 717 (Emphasis in original).

IV. CONCLUSION

The legislative history and language of the CEA clearly indicate that the Fifth Circuit correctly concluded that there is no implied private right of action for violation of the antifraud and registration provisions of the Commodity Exchange Act as amended. Since the Fifth Circuit opinion is correct and raises no substantial unanswered question of federal law, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 13th day of April, 1981.

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